United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2007

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

JUAN SERGIO SALAS,

Appellant.

Docket No. 74-2007

On Appeal From the United States District Court For The Southern District of New York

BRIEF FOR APPELLANT

LEAVY & SHAW
Attorneys for Appellant
233 Broadway, Suite 3303
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF FACTS

The facts of this case can be ascertained by looking at the last page of SSS Form 100. The last page is annexed hereto. On April 23, 1971, Juan Salas was issued an SSS Form 104 (a Request for a Student Deferment). This form was issued by his school at the same time that Mr. Salas registered with the Selective Service System.

On July 3, 1971, Juan Salas was classified II-S by a vote of 4-0 of his Local Board. In addition, he was put into the extended liability group. On June 4, 1971, Juan Salas was mailed SSS Form 110 (Notice of Classification) by his Local Board.

Thereafter, on November 16, 1971, Mr. Salas was classified I-A, again by a vote of 4-0, and on November 19, 1971, he was mailed SSS Form 110 (Notice of Classification).

It should be noted that an extremely important fact is omitted from the Minutes of Action sheet. On September 21, 1971, the Ulster County Community College mailed a form to the Local Board certifying that Juan Salas was a full time student who would receive a degree on or about August 1972. Although there is an indication on this Certificate that it was received by the Local Board on September 22, 1971, such receipt is omitted from the Minutes of Action sheet. (See the Certificate annexed hereto.) On January 11, 1972, Juan Salas was reclassified II-S, and on January 20, 1972 he was mailed a Notice of Classification.

On July 17, 1972, Mr. Salas was mailed an order to report for an Armed Forces physical examination, and on September 12, 1972, he was classified I-A by a vote of 3-0 by his Local Board. On September 14, 1972

the registrant was mailed SSS Form 110 (Notice of Classification.) On October 18, 1972, the registrant was mailed SSS Form 62. (Such form indicates acceptability.)

Finally, on November 11, 1972, the registrant was mailed SSS Form 252 (an Order to Report for Induction). On November 24, 1972, the registrant's file was forwarded to the New York State Headquarters for review and advice. On November 29, 1972 the file was returned from the New York State Headquarters. On November 29, 1972, a letter was mailed to the registrant regarding his induction and a copy was sent to his lawyer. On December 18, 1972, the file, SSS Form 301 (a delinquency form) original and three copies were forwarded to the New York State Headquarters.

FACTS RELATING TO THE TRIAL

On May 23rd and 24th, 1974, the defendant was tried before a judge and jury for failure to comply with the Order of Induction. Upon cross examination of the sole government witness, counsel for defendant sought to introduce the defense that defendant could not be called for induction in November 1972 as he was exposed to the draft in 1971 and had only a one year liability under the lottery system.

> "Q. Now, would you tell the jury what the system of calling - what the system was, the lottery system, in 1971, how it operated?
> A. It operated, in 1971 you were called by lottery number until the end of the year, the last induction for the year, to a certain number.
> Q. Anybody who was eligible on December 31st of a year, who was eligible for induction and not called, could they be called during the following year?
> A. Provided he was completely eligible with nothing

pending before the local board that would reclassify him.
Q. With a 1-A classification, what would that indicate to you?
A. Available for service.
Q. Did that mean Mr. Salas was completely available for induction on December 31st, 1971?
A. If he had nothing pending before the local board, yes."

(page 52 of transcript)

At the conclusion of the government's case (page 86 of the transcript), counsel for defense moved for dismissal on this same ground:

"One, on the legal ground on the question of whether Mr. Salas was eligible for induction in 1972, because he was eligible in 1971..."

The government (page 86 of the transcript) invited a Rule 34 motion at that same time saying:

"MR. GOLD: Yes, your Honor. I would be delighted to brief both of the issues just raised by defense counsel. Perhaps it could be treated as a motion for arrest of judgment under Rule 34, should there be one. I submit that both of them are strictly legal questions presenting no proper factual issues for resolution by this jury."

On the question of the validity of the Order of Induction, the Judge instructed the jury:

"The validity of the order to report for induction is not an issue insofar as you the jury are concerned. Its validity, legality, propriety and fairness are not to be speculated upon by you. You are instructed as a matter of law that the order was valid in all respects and that the defendant was bound to obey it."

(page 140 of transcript)

Counsel for the defendant sought to preserve his objection to this element in the Judge's charge:

" THE COURT: All right, Mr. Leavy, do you have

objections to register?
MR. LEAVY: The objection that the jury is bound to find the order absolutely valid.
THE COURT: All right. That objection is denied."

(page 143 of transcript)

Finally, after the verdict, counsel for the defendant again preserved this defense and requested the trial court to consider it:

"THE COURT: Mr. Gold and Mr. Leavy. Mr. Leavy, any motions?
MR. LEAVY: Your Honor, there is one motion I am going to make for a judgment notwithstanding the verdict, on a point which I don't think is at all frivolous, and it goes to the heart of the question of notification ... the legitimacy of the induction notice in December of 1972, and it is a legal issue. The point is whether Mr. Salas was in fact exposed to the draft in 1971, and under the existing regulations would not be drafted in 1972. I could provide that in brief form, your Honor, if I may, and dictate the thing to the reporter.
THE COURT: All right."

(page 146 of transcript)

BRIEF STATEMENT OF ARGUMENT

Defendant contends that he was not liable for induction in 1972. The draft lottery system in effect in 1971 and 1972 contained the following provisions:

1. All persons over the age of 19 and under 26 years of age would receive a random selection number according to their date of birth.
2. All persons eligible for induction would be exposed to induction for one calendar year.
3. If any person was exposed on December 31st of any year and was not inducted, he could be inducted during the months of January, February and March of the following year.
4. Unless there was some reason preventing the Local Board from acting, if any person exposed on December 31st of any year was not inducted by March 31st of the following year, he would be put into the next lower priority selection group.
5. In fact, no persons were ever inducted from this next lower priority selection group.

Because Juan Salas was exposed to induction on December 31, 1971 and not inducted during January, February or March of the following year, and no impediment existed either on December 31, 1971 or during January, February and March of the following year, he should have been put in the next lower priority selection group and not inducted in 1972.

This argument was made before the trial court but not considered. The court held that this defense, made when it was, was precluded by the Strayhorn decision.

Appellant contends that Strayhorn does not apply and the trial court should have considered its motion. Furthermore, the motion was raised early in the trial. Finally, the appellant contends that the motion has merit.

SUMMARY OF ARGUMENT

POINT I - THE TRIAL COURT ERRED BY REFUSING TO RULE ON DEFENDANT'S POST TRIAL MEMORANDUM

A. THIS IS NOT AN "ORDER OF CALL" DEFENSE.

POINT II - DEFENDANT RAISED THE ISSUE OF TIMELINESS OF THE ORDER OF INDUCTION DURING THE GOVERNMENT'S CASE AT TRIAL

POINT III - THE ORDER OF INDUCTION WAS INVALID AS THE DEFENDANT WAS NOT LIABLE FOR INDUCTION IN 1972

POINT IV - THE TESTIMONY OF THE SOLE GOVERNMENT WITNESS WAS ERRONEOUS AND MISLEAD THE COURT AND JURY

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN REFUSING TO RULE ON DEFENDANT'S POST TRIAL MEMORANDUM

A. This is not an "Order of Call" Defense

The trial court's decision on the defendant's post trial memorandum characterized the defense set forth as an Order of Call defense. The decision of the trial judge on this memorandum is as follows:

> "Defendant now moves for a judgment of acquittal pursuant to Rule 29 or Rule 34 to arrest judgment entered. The basis for the motion is irregularity in the call of defendant for induction by the Local Board. That motion is untimely since it should have been made prior to trial and not after verdict. U.S. v. Strayhorn, 471 F.2d 661,664."

The trial court therefore felt bound by the Strayhorn decision to decide that the defense was proffered too late in the proceedings.

An analysis of this defense will show that it is not an Order of Call defense and therefore the decision in Strayhorn does not apply.

In this case, the defendant contends that he could not be issued a lawful Order to Report for Induction in 1972, since he could have been issued a lawful order in 1971. The substance of the defense and Regulations are set forth more fully in a following point. Essentially, the defendant contends that the relevant Regulations provided for one year liability to the draft and once that year was over, he was not liable. If not drafted during the calendar year of liability, he should be assigned to a lower priority pool. Since the registrant herein became liable to be drafted in 1971, the Order of Induction issued in November 1972 was untimely. This is not an Order of Call defense or a Strayhorn

case.

In Strayhorn, this Court defined an Order of Call defense:

> "As its name implies, the order of call defense involves contentions by a Selective Service defendant that his order for induction came out of proper sequence, or conversely, that others who should have been called before him were not." U.S. v. Strayhorn, supra, p. 662.

Further,

> "In practice, the discharge of the various evidentiary burdens outlined above need not be cumbersome. The defendant can meet his initial requirement by merely showing that, at the time of his induction order, there existed enough available 1-A's with higher priorities for call than his, whose inclusion on a monthly list would have 'bumped' him off." U.S. v. Strayhorn, p. 664.

Therefore, it can be seen from the description in Strayhorn that an Order of Call defense involves a determination of the defendant's position in the Local Board vis a vis other registrants. This is not the nature of the defense in this case. In this case, the defendant says that he was not liable for induction in November 1972, as he was liable in 1971, and that the Regulations provided for one year of liability. Therefore, his Order of Induction was untimely. He need not provide any comparison of his position to that of other registrants in his Local Board.

Thus, the burdensome process of examining the files of other registrants is not relevant to this case, as it would be in the case of an Order of Call defense. Here, it need only be determined whether this registrant's Order of Induction was sent in a timely fashion by the Local Board.

POINT II

DEFENDANT RAISED THE ISSUE OF TIMELINESS OF THE ORDER OF INDUCTION DURING THE GOVERNMENT'S CASE AT TRIAL

Promptly upon cross examination of the sole government witness, counsel for the defendant sought to raise the issue of the timeliness of the Order of Induction. (See transcript, pages 51 - 60.) Therefore, the issue was before the court during the Government's testimony.

The Sixth Circuit in the case of United States v. Dudley, 451 F.2d 1300 (1971) said at page 1303:

> "Once the criminal defendant introduces 'some evidence' of irregularities in the call-up order, however, the Government has been required to prove beyond a reasonable doubt that the proper order was, in fact followed. Rusk v. United States, 419 F.2d 133 (9th Cir. 1969); cf. United States v. Baker, United States v. Weintraub, supra."

Further, at page 1303:

> "At trial, Appellant attempted to show departure from the proper order of call. He sought to do this by examining the secretary of the Local Board with respect to the monthly induction (or delivery lists). Such approach has been held to be a reliable way of determining whether or not the proper sequence of call has been followed."

Although in Dudley, the court indicates in a footnote that notice of this defense was given before trial, no such pre-trial notice was apparently given in this case. However, the defense in Dudley was a standard Order of Call defense. This required the examination and analysis of files of registrants who were not on trial. In this case, only the file of the defendant on trial was relevant.

Typically, the Order of Call defense involves a question of

fact as to how many other registrants were available who had a higher priority at the time the defendant was called. Here the defense involved a question of law involving the legality of the board sending this registrant a Notice of Induction in 1972 if he was eligible in 1971. (See transcript, pages 51 - 60.)

POINT III

THE ORDER OF INDUCTION WAS INVALID AS THE DEFENDANT WAS NOT LIABLE FOR INDUCTION IN 1972

On June 3, 1971, when Local Board 19 classified Juan Salas II-S, it made the first of several important mistakes. Regulation 32 CFR 1622.25 is entitled "Class II-S: Registrant deferred because of activity in study." It states in pertinent part:

> "(a) In Class II-S shall be placed any registrant who has requested such deferment and who is satisfactorily pursuing a full-time course of instruction at a college, University, or similar institution of learning, such deferment to continue until such registrant completes the requirement for his baccalaureate degree, fails to pursue satisfactorily a full-time course of instruction, or attains the twenty-fourth anniversary of the date of his birth, whichever occurs first."

As the classification questionnaire clearly states, the date of Juan Salas' birth is December 24, 1946. Therefore, the twenty-fourth anniversary of the date of his birth was December 24, 1970. On June 3, 1971, he was not entitled to a II-S deferment. It may be argued by the government that the gratuitous granting of this II-S deferment did not in fact prejudice his rights. However, subsequent mistakes in classification did in fact prejudice this registrant's rights.

On November 16, 1971, Mr. Salas was classified I-A, available for induction. For some reason, which is unclear, the Local Board at this time correctly classified Mr. Salas. It is to be noted, however, that no force, effect or apparent consideration was given to the Student Certificate received by the Board on September 22, 1971.

Regulation 32 CRF 1631.7 entitled "Action by a Local Board upon Receipt of Notice of Call" sets forth the regulations governing a Local Board as to the order of which men can be called or selected for induction. Paragraph (b) states as follows:

> "Registrants shall be selected and ordered to report for inductions in the following categories and in the order indicated:
>
> 1) Volunteers who have not attained the age of twenty-six years in the sequence in which they have volunteered for induction.
>
> 2) Nonvolunteers in the Extended Priority Selection Group in the order of their random sequence number established by random selection procedures prescribed in accordance with paragraph (d) of § 1631.5.
>
> 3) Nonvolunteers in the First Priority Selection Group in the order of their random sequence number established by random selection procedures prescribed in accordance with paragraph (d) of § 1631.5.
>
> 4) Nonvolunteers in each of the lower priority selection groups, in turn, within the group in the order of their random sequence number established by random selection procedures prescribed in accordance with paragraph (d) of § 1631.5."

The court should take judicial notice that registrants in categories 4 (above) and those following, were not called for induction in 1971 or 1972.

Therefore, it is the contention of the defendant that since he properly should have been in the number 4 selection group in 1972, he was improperly called for induction.

Regulation 32 CFR 1631.7 subparagraph (c) defines the manner in which registrants shall be placed in selection groups. This subparagraph states:

" 1) Extended Priority Selection Group consists of registrants who on December 31 were members of the First Priority Selection Group whose random sequence number had been reached but who had not been issued Orders to Report for Induction.

2) First Priority Selection Group:

(i) 1970. In the calendar year 1970, nonvolunteers in Class I-A or Class I-A-O born on or after January 1, 1944 and on or before December 31, 1950 who have not attained the 26th anniversary of the dates of their birth.

(ii) 1971 and later years. In the calendar year 1971 and each calendar year thereafter, nonvolunteers in Class I-A or Class I-A-O who prior to January of each such calendar year have attained the age of 19 years but not of 20 years and nonvolunteers who prior to January 1 of each such calendar year have attained the age of 19 but not of 26 years and who during that year are classified into Class I-A or Class I-A-O."

The regulations go on to state in subparagraph (d):

"(d) Procedures.

1) Local Board shall identify registrants in the appropriate groups as provided in this section.

2) Members of the First Priority Selection Group on December 31 in any calendar year whose random sequence numbers have not been reached by that date, or members of any subgroup which was not reached during such calendar year, shall be assigned to the priority selection group which is next below the First Priority Selection Group for the immediately succeeding calendar year ...

5) Members of the Extended Priority Selection Group who have not been issued orders to report for induction and originally scheduled for a date prior to April 1 shall forthwith be assigned to the lower priority selection group to which they would have been assigned had they never been assigned to the Extended Priority Selection Group; except that members of the Extended Priority Selection Group who would have been ordered to

> report for induction to fill the last call in the first quarter of the calendar year but who could not be issued orders shall remain in the Extended Priority Selection Group and shall be ordered to report for induction as soon as practicable. Circumstances which would prevent such an order shall include but not be limited to those arising from a personal appearance, appeal, pre-induction physical examination, reconsideration, judicial proceeding, or inability of the local board to act."

Therefore, on December 31, 1971, as Mr. Salas' number had been reached in 1971, the Local Board, as defined in the regulations, could only place him in the Extended Priority Selection Group and issue him a Notice of Induction as soon as practicable. If not, he would be assigned to the next lower selection group. Evidence given by the government witness on trial under cross examination that the Local Board could not issue a Notice of Induction was substantially incorrect. The answer to the question posed as to why the Local Board did not issue a Notice of Induction was because the Local Board may have had before it a request for a student deferment. This is incorrect on two grounds. First, this request for a student deferment was received on September 22, 1971, and was either overlooked, disregarded or decided irrelevant when the Local Board met in November of 1971 and classified the registrant I-A. Secondly, this request for a student deferment was legally irrelevant because the registrant had already passed his 24th birthday. Therefore, the Local Board was at liberty to issue a Notice of Induction in 1971. By not doing so, the registrant fell into the lower selection priority group for 1972. By falling into the lower priority for the calendar year of 1972, Mr. Salas should not have been called for induction.

POINT IV

THE TESTIMONY OF THE SOLE GOVERNMENT WITNESS WAS ERRONEOUS AND MISLEAD THE COURT AND JURY

It was extremely important to the defense to determine if the defendant was available to be drafted by his Local Board on the last day of 1971. The Government's witness had been qualified as an expert on Selective Service law.

During cross examination, the Local Board member testified that Mr. Salas was technically ineligible on December 31, 1971 because of a pending student certificate which had arrived at the Local Board on September 22, 1971:

"Q. In reviewing the file, have you seen anything that made Mr. Salas unavailable for induction on December 31, 1971?
A. I do.
Q. And what is that?
A. A student certificate.
Q. When did that student certificate arrive at the local board?
A. September 22, 1971.
Q. On September 22, 1971?
A. Correct.
Q. However, what was Mr. Salas' classification during December 31, 1971?
A. On December 31, 1971, he was still 1-A.
Q. Could the local board have mailed him a notice of induction?
A. Provided his number had been reached, yes.
Q. If his number had been reached in 1971, the local board could have mailed him a notice of induction?
A. Technically, no, not until this student certificate was acted upon by the local board.
Q. Could the local board have sent him a notice of induction in December of 1971; did they have that authority?

MR. GOLD: Objection, your Honor. He is not offered as an expert. He was merely a custodian of the records. It is cross examination.
THE COURT: You didn't object to the fact. Mr. Leavy asked him if he was an expert. And he said he had been qualified as an expert in prior questions. I heard no objection at that point."

(pages 54-56 of transcript.)

However, the student certificate had arrived on September 22, 1971. The Minutes of Action sheet indicates that the Board met on November 16, 1971 and by a vote of 4-0, voted to classify the registrant 1-A.

It must be assumed that the meeting of the Board in November considered the Student Certificate which had arrived at the Board in September.

It is clear that the trial Judge, if not the jury, assumed from the testimony that the Student Certificate had not been acted upon.

"THE COURT: I think, as I understand what has been said by him, he indicated that this man was classified as 1-A -- he made it very clear -- and that he would have been eligible to have been inducted provided there was nothing before the local board to be acted upon in regard to that matter. He has looked through the file and he says that there was a student application which had not been acted upon, and therefore that he could not have been sent a notice for induction until that had been decided. It seems to me he has made it very clear precisely what is going on, Mr. Leavy. Have I summed up correctly?
THE WITNESS: Yes, your Honor."

(page 57 of transcript)

Since the witness was not a member of the Local Board, there was no showing whether the Local Board did consider the student certificate when they met in November 1971. Nevertheless, they voted 4-0 to classify

the registrant 1-A.

This was legally correct. The registrant had reached his 24th birthday and was no longer entitled to a student deferment.

This 1-A continued past December 31, 1971 and the registrant's number was reached. Therefore he should have been drafted with the 1971 group of inductees. This would allow an administrative grace period so that his Board could have sent him his notice to report during the months of January, February and March of 1972.

But the Board did not. It chose instead, in January 1972, to grant a student deferment. This deferment was unauthorized, as the registrant was over 24 years old and no longer eligible for a student deferment. By this act, the Government contends, the registrant became eligible for yet another year.

This Court should take judicial notice of the fact that because of a policy issued by the then Secretary of Defense, no one was issued a Notice to Report for Induction during the months of January, February or March of 1972. Thus, this registrant should have been passed into the second priority group.

The Local Board's action was erroneous under the Regulations. It was done under the questionable circumstances of making the registrant 1-A in November 1971 and then II-S in January 1972. Whether the Board did this maliciously or not does not matter.

The Regulations set forth in Point III as applied to this registrant provide that he should have been dropped to a lower priority induction group. If the Board had acted according to the Regulations, Mr. Salas could not have been sent a Notice to Report for Induction in

November 1972.

The mistake made by the Board in January 1972 giving this registrant a belated, unlawful II-S deferment could not legally prevent this.

Had the Government's witness explained this at trial, this case would not have gotten this far. The Notice of Induction was unlawfully issued. As such, this prosecution based on that Notice of Induction must be dismissed.

CONCLUSION

It is respectfully submitted that:

This defendant has a conclusive defense in that his Order of Induction, issued when it was, was unlawful.

That the line of cases describing the "Order of Call" defense, and limited by this court in its decision in United States v. Strayhorn does not apply.

That this defense was asserted early in the trial of this defendant. And if not for misleading testimony of the Government witness, would have been dismissed by the trial court.

That since the Government's prosecution in this case relies on a valid Order of Induction, then this prosecution must be dismissed.